Supreme Court, U. S.
FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-286

GARRISON FRAZIER, ... *Petitioner*

V.

COMMONWEALTH OF KENTUCKY, ... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

JOHN Y. BROWN, SR.
Brown, Sledd & McCann, PSC
300 West Short Street
Lexington, Kentucky 40507

John Y. Brown, Sr.
Attorney for Petitioner FJV

August 17th, 1978.

PRINT MASTER INC., 845 Lane Allen Rd., P.O. Box 4183, Lexington, Ky. 40504, Ph. 277-5134

INDEX

Page

Authorities Cited ..... ii-iii

Opinions Below 1-2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions Involved 3

Statement of the Case 3-8

Reasons for Granting the Writ 8-22

THE ADMONITION BY THE TRIAL COURT AT THE CONCLUSION OF THE FIRST DAY IMPLIEDLY ALLOWED THE JURY TO FORM AN OPINION ON THE CASE BEFORE THE COMPLETION OF THE PETITIONER'S PROOF AND BEFORE ALL OF THE EVIDENCE HAD BEEN SUBMITTED TO IT, IN VIOLATION OF APPLICABLE DUE PROCESS AND SIXTH AMENDMENT STANDARDS. 8-14

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY TRIAL COURT RULINGS LATER HELD HARMLESS WHICH RESULTED IN HIS CONVICTION BASED ON PURELY CIRCUMSTANTIAL EVIDENCE. 14-22

Conclusion 23

Appendix 1a-13a

AUTHORITIES CITED

CASES: Page

Barber v. *Page*,
390 U.S. 719, 88 S. Ct. 1318,
20 L. Ed. 2d 255 (1968) 16

Bruton v. *United States*,
391 U.S. 123, 88 S Ct 1620,
20 L Ed2d 476 (1968) 17

Chapman v. *California*,
386 U.S. 18, 87 S Ct 24,
17 L Ed2d 705 (1967) 16

Douglas v. *Alabama*,
380 U.S. 415, 85 S.Ct. 1074,
13 L. Ed. 2d 934 (1965) 9

Drope v. *Missouri*,
420 U.S. 162, 172, 95 SCt 896,
43 L Ed2d 103 (1975) 13

Estelle v. *Williams*,
425 U.S. 501, 96 SCt 1691,
48 L Ed2d 126 (1976) 13, 19, 20, 22

Harrington v. *California*,
395 U.S. 250, 89 S Ct 1726,
23 L Ed2d 284 (1969) 16-17

Pointer v. *Texas*,
380 U.S. 400, 85 S. Ct. 1065,
13 L. Ed. 2d 923 (1965) 9, 15, 16

Schweinefuss v. *Commonwealth*,
395 S.W.2d 370 (Ky. 1965) 12

AUTHORITIES CITED (Continued)

CASES: Page

Taylor v. *Kentucky*,
— U.S. — (decided May 30,
1978) 5, 19, 20, 22

Wall v. *American Optometric Association, Inc.*, 379 F.Supp.175 (D.C. Ga. 1974),
affirmed 419 U.S. 888, 95 S. Ct. 166,
42 L. Ed. 2d 134, rehearing denied
419 U.S. 1061, 95 S. Ct. 648,
42 L. Ed. 2d 659 12

STATUTE:

28 U.S.C. §1257(3) 2

CONSTITUTIONAL PROVISIONS:

Sixth Amendment to the United States Constitution 3, 8, 9, 11, 12, 13, 17, 23

Fourteenth Amendment to the United States Constitution 3, 8, 12, 13, 14, 15, 17, 23

OTHER AUTHORITIES:

KRS 511.020 3

KRCP Rule 76.20(9)(c) 4

Supreme Court Rule 58(2) 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO._____

GARRISON FRAZIER, ... *Petitioner*

V.

COMMONWEALTH OF KENTUCKY, ... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Garrison Frazier, respectfully moves and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on May 22, 1978.

OPINIONS BELOW

The original unpublished opinion of the Court of Appeals of Kentucky confirming Petitioner's conviction was filed on September 9, 1977. Thereafter the petitioner sought a rehearing and modification before the Court of Appeals of

Kentucky which was timely filed on September 29, 1977. The second opinion of the Court of Appeals of Kentucky, as modified, again unpublished, was issued on January 6, 1978, affirming Petitioner's conviction.

Thereafter the Petitioner timely filed his motion for discretionary review to the Supreme Court of Kentucky on January 25, 1978. The order of the Supreme Court of Kentucky denying Petitioner's motion for discretionary review was issued May 16, 1978. The mandate was issued by the Court of Appeals of Kentucky on May 22, 1978. The Petitioner then sought reconsideration by the Kentucky Supreme Court on June 26, 1978 which was denied by order of the Kentucky Supreme Court, one Justice voting to reconsider, on July 21, 1978. Copies of the above mentioned opinions, orders and mandate are attached hereto and made a part hereof by reference.

JURISDICTION

The mandate of the Court of Appeals was issued in Petitioner's case on May 22, 1978 after a denial of petitioner's motion for discretionary review to the Kentucky Supreme Court was denied on May 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner was denied his constitutional right to due process of law, an impartial jury and fair trial by the implication by the Trial Court that the jury was permitted to form an opinion on the case before all evidence had been heard?

2. Whether Petitioner was denied his constitutional right to due process of law and a fair trial by a series of trial court rulings, considered harmless by the Court of Appeals of Kentucky, but which cumulatively were prejudicial to the Petitioner resulting in a conviction based on purely circumstantial evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The petitioner, Garrison Frazier, was tried in the Madison Circuit Court, located in Richmond, Madison County, Kentucky, on a charge of burglary in the first degree, a violation of Kentucky Revised Statute (hereinafter KRS) 511.020. Petitioner was convicted by a jury as charged on November 30, 1976, and sentenced to confinement in the state penitentiary for a period of ten years. Final

judgment was entered against petitioner on December 16, 1976 and notice of appeal was filed the same day to the Kentucky Court of Appeals.

After oral arguments were heard by the Kentucky Court of Appeals on August 24, 1977, that Court in an unpublished opinion affirmed the Petitioner's conviction on September 9, 1977. Thereafter, the petitioner timely filed his motion for modification or rehearing. The Kentucky Court of Appeals technically denied this motion but substituted another unpublished opinion as modified on January 6, 1978.

The petitioner then timely filed his motion for discretionary review to the Kentucky Supreme Court which was denied on May 16, 1978. Even though there is no provision for this practice, and it is expressly prohibited,[1] the petitioner sought

1. The applicable rule provides that the Kentucky Supreme Court, after considering a motion by a party for discretionary review from an adverse decision by the Kentucky Court of Appeals, the ruling must stand regardless of any other consideration. The exact language of the rule may be found at Rule 76.20 (9) (c) of the Kentucky Rules of Civil Procedure as follows:

> "The ruling on the motion will not be reconsidered on a petition for rehearing, modification, or extension, or motion to set aside;"

This rule promulgated by the Kentucky Supreme Court denies the petitioner due process rights as it absolutely

(*continued on page 5*)

reconsideration from the Kentucky Supreme Court in light of this Court's recent opinion of *Taylor* v. *Kentucky,-U.S.-* (decided May 30, 1978). Petitioner's motion for reconsideration was denied on July 21, 1978, with one Justice of the Kentucky Supreme Court voting to grant the motion. The mandate was issued by the Kentucky Court of Appeals on May 22, 1978.

The facts in evidence, as produced at the trial, show that the petitioner, Garrison Frazier, on the

(*footnote 1, continued from page 4*)

prohibits and bars any reconsideration, rehearing or other modification of the denial for discretionary review. Even though the Kentucky Supreme Court does not have to state grounds for any denial of the motion for discretionary review, due process guarantees should allow a party to present new or changing authority related to the specific issue.

In the case at bar, this Court substantially altered and condemned current Kentucky practice in the ruling of *Taylor* v. *Ky.-U.S.* (decided May 30, 1978). In addition to requiring an instruction on the presumption of innocence, if requested by the defense attorney in criminal cases, this decision also made it clear that the trial judge had direct responsibility for the administration of substantive constitutional rights to criminal defendants.

Even though this Court is certainly not required to accept or review cases on a Petition for Writ of Certiorari to review state court matters, there is a due process guarantee for reconsideration embodied within the Supreme Court Rules, Supreme Court Rule 58 (2). Under the current rule in Kentucky, no reason or grounds need be given for denial of a motion for discretionary review. Even in the face of this absolute prohibition, one Justice of the Kentucky Supreme Court felt this case raised sufficient substantive and constitutional issues to grant the review and reconsideration.

day in question that the first degree burglary allegedly occurred, had worked on an automobile belonging to Mr. Charles Hays, who was later indicted on this same charge as a co-defendant but who did not appear at trial. The petitioner was an experienced auto mechanic who operated a garage at the particular time in question. Petitioner had previously done some work on the Hays automobile and was attempting to repair and stand behind his guarantee (Transcript of Evidence, hereinafter referred to as T.E., p.107) Hays had complained that the vehicle leaked oil at turnpike speeds, so the petitioner was testing the automobile on Interstate 75 going from Lexington, Kentucky to Richmond, Madison County, Kentucky, which is approximately 35 miles away. The petitioner and Hays left Interstate 75 at the Richmond, Kentucky exit and were stopped shortly thereafter by the Kentucky State police. Petitioner and Hays identified themselves and produced operator licenses for identification. Approximately one and a half hours later, the same Kentucky State trooper saw the station wagon being driven by petitioner near another exit off Interstate 75 in Richmond, Madison County, Kentucky. The petitioner was admittedly the driver of the station wagon at all times on this particular night in question. Hays, the evidence at trial conclusively showed, was a paraplegic who was riding on the passenger side in the station wagon.

On the second occasion, the state troopers approached the station wagon when one of them allegedly observed a red shotgun case being placed under the car from the passenger's side. After retrieving the red object, which later turned out to be the shotgun case, the Kentucky state trooper asked the petitioner what he knew of the item. Petitioner replied he had never seen it before. (T.E., p.45) Hays was asked the identical question and responded the same (T.E., p.45).

The state troopers then ran a "check" on the motor vehicle license tag, petitioner, Hays and the gun and gun case. After all these reports were returned negative, the state trooper approached Hays, who had not moved from his passenger's seat. The trooper again inquired about the gun case to which Hays allegedly stated he had gotten scared and put the gun and gun case under the car, just before the police arrived (T.E., p.45). The police again searched the vehicle and then released petitioner and Hays. (T.E., p.84).

The state trooper then testified he was notified of the break-in at the Gerald Kuhn residence in Madison County, Kentucky and went to investigate that crime. On learning that a gun case and shotgun had been stolen from Mr. Kuhn, the state trooper then showed the gun and gun case which he had confiscated from petitioner and Hays, which was identified by Mr. Kuhn as his personal property

which had been stolen in the crime. (T.E., p.49). Thereupon the state trooper instigated criminal warrants against the petitioner and Hays. The petitioner turned himself in to the police station the day following the alleged burglary. Hays was arrested and charged in the same indictment but failed to appear for trial. All of the evidence produced at trial was circumstantial in nature. Petitioner absolutely denies any knowledge or culpability into the burglary of Mr. Kuhn's residence on the night in question (T.E., pp.138-139).

REASONS FOR GRANTING THE WRIT

THE ADMONITION BY THE TRIAL COURT AT THE CONCLUSION OF THE FIRST DAY IMPLIEDLY ALLOWED THE JURY TO FORM AN OPINION ON THE CASE BEFORE THE COMPLETION OF THE PETITIONER'S PROOF AND BEFORE ALL OF THE EVIDENCE HAD BEEN SUBMITTED TO IT, IN VIOLATION OF APPLICABLE DUE PROCESS AND SIXTH AMENDMENT STANDARDS.

The Sixth amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth amendment to the United States Constitution, guarantees to the citizens of the several states the following:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by *an impartial jury*, of the state and district

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense." (Emphasis ours)

This provision is applicable to the states and is guaranteed to the individual citizens, *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L. Ed. 2d 923 (1965) and *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L. Ed. 2d 934 (1965). One of the basic rights enjoyed by the citizens of the United States is the right to have their criminal trial heard and decided by an impartial jury of their peers. This right is guaranteed to them by the Sixth amendment to the United States Constitution and generally through the various state constitutions. The right to have a jury decide the case based strictly upon the evidence is well settled and beyond argument. This principle has been codified in Kentucky as part of the rules of criminal procedure adopted by the Kentucky Supreme Court and promulgated to govern procedure and practice in all criminal proceedings in Kentucky. Among the various requirements promulgated in those rules is the requirement for the trial judge to "admonish" the jurors during a recess or court adjournment to base their verdict strictly upon the evidence adduced at trial. This requirement

is found in the Kentucky Rules for Criminal Procedure ("RCr") as follows:

"RULE 9.70

ADMONITION TO JURY

The jurors, whether permitted to separate or kept in charge of officers, must be admonished by the Court that it is their duty not to permit anyone to speak to or communicate with them on any subject connected with the trial and that all attempts to do so should be immediately reported by them to the court and that they should not converse among themselves on any subject connected with the trial, *nor form, nor express any opinion thereon until the cause be finally submitted to them.* This admonition must be given or referred to by the court at each adjournment." (Emphasis ours)

In the case at bar, at the conclusion of the first day of trial the trial court remarked in pertinent part to the jury (T.E., pp.132-133):

"THE COURT:
To the jury, we are stopping a little bit early tonight. We have a reason for stopping, plus the fact that the roads are a little bad, and it will give everybody a chance to get a little earlier start home, I suppose. But again, to the jury, you are admonished during this overnight recess, as before, and I am not saying this because I enjoy saying it, but the record must

reflect that I have told you this, so you are admonished not to form or express any opinion regarding the merits of this case until the case is finally submitted to you. *That doesn't say you are not forming any,* but you are not to lock in or create an opinion yet, until you have heard all the evidence. . . ."

The Commonwealth had just concluded its evidence and had announced closed. The petitioner had been testifying in his defense for a very short period of time when the court concluded the first day of testimony. Therefore the jury had heard all the evidence on behalf of the Commonwealth but had heard only a very small portion or inkling of the testimony by the petitioner. It is obvious that the trial court was implying to the jury that he certainly did not believe in the required admonition, that he certainly did not enjoy it, and that he was implying and condoning on the part of the jury their human tendency to go ahead and form an opinion of the case even though all the evidence had not been produced nor had the case been submitted to them for consideration. It can hardly be a more flagrant violation of the Sixth amendment guarantees to the petitioner to have a jury deciding his guilt or innocence based strictly upon the evidence produced by the Commonwealth. This is hardly the "impartial" jury as guaranteed to him in the United States Constitution.

It is clear that the "impartial jury requirement of the Sixth amendment guarantees a jury of one's peers, free from bias or prejudice or predisposition toward one party or the other. This thought was expressed in *Wall* v. *American Optometric Association, Inc.*, 379 F.Supp.175 (D.C. Ga. 1974), affirmed 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134, rehearing denied 419 U.S. 1061, 95 S. Ct. 648, 42 L. Ed. 2d 659, where it held that a fair and impartial tribunal requires at least that the trier of fact be disinterested and that he also be free from any form of bias or *predisposition* regarding outcome of the case and that the procedure utilized must not only be fair, but that the very appearance of complete fairness must also be present. It is respectfully submitted that the trial court in the case at bar failed that standard and neither gave the petitioner the impartial tribunal to which he was entitled, nor was the petitioner given the appearance of fairness. It is respectfully submitted that these failures deprived the petitioner of his Sixth Amendment rights made applicable to the states through the Fourteenth Amendment clause of due process.

It is also clear under Kentucky law that the failure to give the required admonition is error but it is often characterized as "harmless", *Schweinefuss* v. *Commonwealth*, 395 S.W.2d 370 (Ky. 1965). It cannot be denied that the right to a fair trial is a

fundamental liberty secured by the Fourteenth Amendment to the United States Constitution, *Drope* v. *Missouri*, 420 U.S. 162, 172, 95 SCt 896, 43 L Ed2d 103 (1975), and *Estelle* v. *Williams*, 425 U.S. 501, 96 SCt 1691, 48 L Ed2d 126 (1976).

It is clear that the petitioner's Sixth Amendment rights guaranteed to him through the Fourteenth Amendment would be violated if the trial judge insinuated, implied or condoned the concept to the jury that an opinion could be formed at the conclusion of the Commonwealth evidence before all of the evidence had been heard. This is precisely the facts in the case at bar. The Commonwealth had just concluded its case and the petitioner had testified for only a short period of time when the Judge adjourned the Court for the night. At that critical juncture in petitioner's trial, the Judge, in whom jurors in that community have the utmost respect, implied that it was permissible, even though the law required him to give them an admonition, for them to begin forming an opinion on the case at *that* time. This is not the right to which the petitioner is guaranteed through the Sixth Amendment, or the Fourteenth Amendment, to the Constitution of the United States, or which the fair trial concept is premised. It is not a fair trial when the case is decided before all the evidence has been heard.

This denial, alone, justifies the issuance of a writ of certiorari from this Court to review the judgment of the Kentucky Court of Appeals.

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY TRIAL COURT RULINGS LATER HELD HARMLESS WHICH RESULTED IN HIS CONVICTION BASED ON PURELY CIRCUMSTANTIAL EVIDENCE.

The petitioner was further denied his due process rights guaranteed to him through the Fourteenth Amendment to the United States Constitution by a series of trial court rulings that severely prejudiced the petitioner in the eyes of the jury but which were later held to be "harmless" by the Kentucky Court of Appeals without further justification.

The trial court permitted the Kentucky State Trooper to testify to an admittedly hearsay statement made by the co-defendant, Hays, even though Hays was not present at trial. After the state trooper stopped the petitioner and Hays on the second occasion when the shotgun case was found, Hays at first denied any knowledge of it, but later recanted this story and allegedly told the trooper that the gun was there when he and the petitioner pulled off the emergency strip and that they had gotten scared and thrown it out when the troopers arrived (T.E. p. 45). Because the conviction was based upon purely circumstantial evidence, the

credibility of the petitioner was very much in issue. If the jury could conclude that Hays, as a co-indictee, was changing his story about the shotgun case, it was but a minor step to conclude that the petitioner's credibility was in doubt. There can be little doubt that this statement alledgedly made by Hays to the investigating state trooper was rank hearsay. The Court of Appeals, in addressing itself to this issue, opined that:

> "[T]he Court is not concerned with an exception to the hearsay rule in the instant case, as the statement of the co-defendant was exculpatory and not accusatory and, if any error occurred, it was harmless error." (Kentucky Court of Appeals Opinion, p. 2.).

The important factor is that the credibility of the co-defendant was directly challenged by the investigating state trooper and then put in issue at petitioner's trial. This procedure utilized by the trial court deprived the petitioner of his constitutional right to confrontation and cross-examination of witnesses against him as guaranteed through the Fourteenth Amendment, *Pointer* v. *Texas, supra.* There is no doubt that the right of confrontation and cross-examination is a crucial right guaranteed to the petitioner in the case at bar. As this Court indicated in *Pointer* v. *Texas,* supra:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal", *Pointer,* at 405.

In this case, Hays was a co-defendant but not present at trial to refute or agree with the state trooper's testimony of their conversation. This hearsay statement denied to the petitioner his right to confront and cross-examine Hays on this important point, which directly challenged the petitioner's credibility in the eyes of the jury. This cannot stand in light of *Pointer* v. *Texas, supra,* and *Barber* v. *Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). This Court in *Barber* v. *Page,* supra reversed a state court conviction on similar grounds where the testimony of a co-defendant at a preliminary hearing was used at trial.

The petitioner was further denied his constitutional rights on this issue when the Kentucky Court of Appeals failed to find, as previously required by this Court, that the "harmless error" was harmless beyond a reasonable doubt, *Chapman* v. *California,* 386 U.S. 18, 87 S Ct 24, 17 L Ed2d 705 (1967) and *Harrington* v. *California,* 395 U.S. 250, 89 S Ct 1726, 23 L Ed2d

284 (1969). The Kentucky Court of Appeals made no such finding and were silent upon their standards or grounds for holding this admitted error "harmless." Where there is any question that this error contributed to the conviction, especially when this Court considers the conviction was based solely upon circumstantial evidence, the petitioner has been denied his constitutional right in this area. Petitioner has also been denied the rights guaranteed to him in *Bruton* v. *United States,* 391 U.S.123, 88 S Ct 1620, 20 L Ed2d 476 (1968), by the introduction of statements to the jury by a co-defendant.

Secondly, the petitioner was further denied his constitutional rights of due process as guaranteed in the Sixth Amendment and made applicable through the Fourteenth Amendment to the United States Constitution in that he was deprived of a fair trial before an impartial tribunal or trial judge. There were repeated occasions during the trial when the Court made its feelings known, both in and out of the presence of the jury, concerning the petitioner's guilt. Even though the Federal Court has leeway in addressing the jury, this practice is not allowed to Kentucky trial judges, and has been the basis for reversal on several occasions. It is a Federal constitutional violation because even if this was a Federal trial, the active part played by the trial judge certainly denied to the petitioner his

constitutional right of an impartial tribunal. In the case at bar, after the petitioner had testified regarding his innocence and the absolute lack of knowledge of the co-defendant, Hays, the trial judge saw fit to question the petitioner further, in the presence of the jury, even after extensive cross-examination by the Commonwealth Attorney. This Court is directed to the following colloquay (T.E. pp. 163-164):

"Examination by the Court:"

Q.1: All right; I want to know, where is Mr. Hays?

A: I have no idea.

Q.2: You say he is your next-door neighbor; is he still your next-door neighbor?

A: They have moved out. They moved out while I was in the hospital.

Q.3: When were you in the hospital?

A. I don't know what date it was on. It was on Thursday. I am not sure what date. I would have to check and see.

Q.4: You went in on Thursday and came out on Thursday?

A: No, I came out on Friday.

Q.5: And while you were gone, they moved?

A: They moved that night.

Q.6: And you don't know where he is now or anything about him.

A: I have no idea where he is.

THE COURT: All right; you may step down"

This was essentially a repetition of the cross-examination questions by the Commonwealth Attorney. The conclusion is inescapable to the jury that the trial judge does not believe the petitioner and is making sure that the jury recognizes this concept. This is certainly a denial of the petitioner's due process rights guaranteed to him through the Federal Constitution which were violated in this trial.

The petitioner's constitutional rights were further violated when the presumption of innocence guaranteed to him through the United States Constitution, *Estelle* v. *Williams, supra,* and *Taylor* v. *Commonwealth of Kentucky,* — U.S. — (Decided May 30, 1978), was lost through actions of the trial judge. The trial court allowed the Commonwealth to ask a character witness testifying for the petitioner whether the witness was aware that the petitioner had been *arrested* for the charge of "theft by unlawful taking" (T.E. p. 195). After a timely objection by petitioner's trial counsel, the trial court allowed the Commonwealth to continue the questioning. The proof indicated the petitioner had, indeed, been *arrested* for the charge, but that the

charge was dismissed the day after the arrest with no subsequent involvement with the law. By allowing the jury to hear of this previous *arrest,* the trial judge made it clear that we were dealing with a "criminal" and that the jury should take notice of that fact. This action by the trial judge flies in direct contradiction to the "presumption of innocence" standard under the United States Constitution as previously discussed in *Estelle* v. *Williams, supra,* and *Taylor* v. *Commonwealth of Kentucky.*

On this same point, the trial court allowed into evidence a picture of the petitioner taken on the day of arrest. This picture showed a gentleman with longer hair than "normal" in the Court's eyes, which was somehow important to the Court. In fact, the very purpose for admitting the photograph into evidence was obscured and the court ruling on the subject is very apropos to its entire thinking. In admitting the photograph into evidence, even though there was no denial by the petitioner that he was, in fact, the person charged, the trial court reduced its real feelings to the record (T.E. pp. 68-69):

> THE COURT: Well, I think it would go to appearances. People can make some judgment from appearances. If you saw a man in the middle of a dark night with the beard and moustache, it might alarm you perhaps more than if you saw the same person clean-shaved.

MR. CALVERT: Apprehension is not a part of this case.

THE COURT: I understood he said he stopped these people and questioned them and was suspicious of them.

MR. CALVERT: Suspicious of the car.

MR. COY: IF that is the case, Your Honor, we are all going to be in trouble at the Second Coming.

THE COURT: Even then the judge at that time made the error and —

MR. COY: I recall that.

THE COURT: — — ordered the crucifixion.

MR. COY: I recall that, Your Honor.

THE COURT: So the objection is overruled. And the longer I continue as judge, the more I wonder about the real value of some of our rules of evidence. We screen things out and try it in the abstract, but things don't happen in the abstract. The English system used to be the witnesses made up the jury and now we have gone full circle to where we look like at times we are more dedicated to barring the truth than permitting it, such as in exclusionary hearings. A policeman's mistake shouldn't be any justification in disallowing the real evidence in a case, but we have done that for a number of years.

What is wrong with this person's picture as he appeared at the time?

> Well, it is subject to review and the appellate court can wax eloquent on it, and the objection is overruled."

The conclusion is inescapable from even a partial scrutiny of the transcript of evidence that the trial court in the case at bar continually flirted the edges of advocacy on behalf of the Commonwealth. When one considers the cumulative effect of these attempts, combined with the fact that this was a case premised upon strictly circumstantial evidence, one must conclude that the guarantees to the petitioner found in the Federal Constitution were completely obviated. This is especially true considering the condemnation of Kentucky instructions recently announced by this Court in *Taylor* v. *Kentucky*, — U.S. — (Decided May 30, 1978), wherein this Court unequivocally held that "[I]t was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." See also *Estelle* v. *Williams*, *supra*. In the case at bar, the trial court is one of the more respected members of the Kentucky bench. However, the petitioner's constitutional rights were violated in the case because of the Court's rulings which fly directly contradictory to the guarantees contained in the Federal constitution. In the final analysis, considering that the conviction was premised strictly upon circumstantial evidence, and considering that the petitioner was denied his constitutional rights of

confrontation and cross-examination of witnesses, and further denied his constitutional rights to a fair and impartial tribunal by the advocacy of the trial judge on behalf of the Commonwealth, an issuance of a writ of certiorari should go forth to the Kentucky Court of Appeals.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Kentucky to consider a constitutional question of importance in the administration of criminal justice involving Sixth Amendment rights to an impartial jury, and Fourteenth Amendment rights of due process of law guaranteed under the Constitution of the United States of America.

Respectfully submitted,

BROWN, SLEDD & McCANN, P.S.C.
300 West Short Street
Lexington, Kentucky 40507

BY: John Y. Brown, Sr. FJV
JOHN Y. BROWN, SR.
Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO._____

GARRISON FRAZIER, ... *Petitioner*

V.

COMMONWEALTH OF KENTUCKY, ... *Respondent*

CERTIFICATE OF SERVICE

I, John Y. Brown, Sr., attorney for Petitioner, hereby certify that the attached petition for writ of certiorari was served upon the Respondent by mailing same in the United States mail on August 17th, 1978, to the Attorney General of Kentucky, Hon. Robert F. Stephens, Capitol Building, Commonwealth of Kentucky, Frankfort, Kentucky 40601.

JOHN Y. BROWN, SR.
Brown, Sledd & McCann, PSC
300 West Short Street
Lexington, Kentucky 40507

John Y. Brown, Sr.
Attorney for Petitioner JYB

APPENDIX

OPINION RENDERED: September 9, 1977
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. CA-1035-MR

GARRISON FRAZIER APPELLANT

V. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JAMES S. CHENAULT, JUDGE
CRIMINAL ACTION NO. 76-81

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

****

BEFORE: GANT, HAYES and HOWERTON, Judges.

GANT, JUDGE. Appellant, convicted of First-Degree Burglary and sentenced to ten years imprisonment, appeals on four basic grounds.

First, appellant argues that he was entitled to a directed verdict of acquittal for insufficient evidence. This argument is totally without merit. The evidence disclosed that the appellant and his co-defendant were seen within a few hundred yards of the scene of the burglary at 10 p.m. and then later at 11:30 p.m., within a reasonable distance of the scene of the burglary and in the same car previously observed and were seen placing a stolen gun from the burglary beneath their car as they were

approached by the state trooper. There was mud throughout the house where the burglary occurred and throughout the vehicle occupied by the two defendants. A gold chain also taken during the burglary was found at the scene where the peace officers observed the defendants placing the gun beneath the car. These pieces of evidence, together with others, made it manifestly clear that there was sufficient evidence to submit this case to the jury.

Second, appellant complains that the testimony of one of the officers relating to a conversation with the co-defendant was prejudicial in that it was not shown to have been within any exception to the hearsay rule. It was established on trial that the appellant was within five feet of the co-defendant when the statement was made and that he understood other statements made by the accomplice. However, the Court is not concerned with an exception to the hearsay rule in the instant case as the statement of the co-defendant was exculpatory and not accusatory and, if any error occurred, it was harmless error.

The third ground was that the Commonwealth was permitted to ask a *character witness* concerning a previous arrest of the appellant. Under such a situation the *Cotton* rule as set forth in *Cotton* v. *Commonwealth,* Ky., 454 S.W.2d 698 (1970) does not come into effect. See *Michelson* v. *United States,* 335 U.S. 469, 60 S.Ct. 213, 93 L.Ed. 168

(1948); *Hendron* v. *Commonwealth,* Ky., 487 S.W.2d 175 (1972), the latter case covering the failure to request an admonition which was not requested here.

The fourth ground constituted a scatter shot, complaining of statements by the Commonwealth Attorney, questions by the judge, and rebuttal evidence which was a repetition of prior testimony. All of these were either not objected to or were harmless error and we find no merit in them. Additionally, appellant complains of the introduction of a picture of the appellant, who was clean-shaven at the trial but at the time of his arrest was bearded and with long hair. We think that the case of *Commonwealth* v. *Urbanski,* Ky., 526 S.W.2d 7 (1975) is dispositive of this question.

For the reasons above stated, the judgment of the lower court is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLEE:

Robert F. Stephens
Attorney General

James L. Dickinson
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

ATTORNEY FOR APPELLANT:

Brown, Sledd & McCann, PSC
300 West Short Street
Lexington, Kentucky 40507

* * * * * * *

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. CA-1035-MR

GARRISON FRAZIER APPELLANT

V. APPEAL FROM MADISON CIRCUIT COURT

COMMONWEALTH OF KENTUCKY APPELLEE

****

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, HAYES and HOWERTON, JUDGES

The Court, having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED. The opinion rendered on September 9, 1977, in the above-styled matter is hereby withdrawn and the opinion is reissued as modified on its face.

ENTERED: January 6, 1978

/s/John P. Hayes
JUDGE, COURT OF APPEALS

* * * * * * *

OPINION RENDERED: September 9, 1977
NOT TO BE PUBLISHED
MODIFIED: January 6, 1978

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. CA-1035-MR

GARRISON FRAZIER APPELLANT

V. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JAMES S. CHENAULT, JUDGE
CRIMINAL ACTION NO. 76-81

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

****

BEFORE: GANT, HAYES and HOWERTON, Judges.

GANT, JUDGE. Appellant, convicted of First-Degree Burglary and sentenced to ten years imprisonment, appeals on four basis grounds.

First, appellant argues that he was entitled to a directed verdict of acquittal for insufficient evidence. This argument is totally without merit. The evidence disclosed that the appellant and his co-defendant were seen within a few hundred yards of the scene of the burglary at 10:00 p.m. and then later at 11:30 p.m., within a reasonable distance of the scene of

the burglary and in the same car previously observed and the co-defendant was seen placing a stolen gun from the burglary beneath their car as they were approached by the state trooper. There was mud throughout the house where the burglary occurred and throughout the vehicle occupied by the two defendants. A gold chain also taken during the burglary was found near the scene where the peace officers observed one defendant placing the gun beneath the car. These pieces of evidence, together with others, made it manifestly clear that there was sufficient evidence to submit this case to the jury.

Second, appellant complains that the testimony of one of the officers relating to a conversation with the co-defendant was prejudicial in that it was not shown to have been within any exception to the hearsay rule. It was established on trial that the appellant was within five feet of the co-defendant when the statement was made and that he understood other statements made by the accomplice. However, the Court is not concerned with an exception to the hearsay rule in the instant case as the statement of the co-defendant was exculpatory and not accusatory and, if any error occurred, it was harmless error.

The third ground was that the Commonwealth was permitted to ask a *character witness* concerning a previous arrest of the appellant. Under such a situation the *Cotton* rule as set forth in *Cotton* v.

Commonwealth, Ky., 454 S.W.2d 698 (1970) does not come into effect. See *Michelson* v. *United States*, 335 U.S. 469, 60 S.Ct. 213, 93 L.Ed. 168 (1948); *Hendron* v. *Commonwealth*, Ky., 487 S.W.2d 175 (1972), the latter case covering the failure to request an admonition which was not requested here.

The fourth ground constituted a scatter shot, complaining of statements by the Commonwealth Attorney, questions by the judge, and rebuttal evidence which was a repetition of prior testimony. All of these were either not objected to or were harmless error and we find no merit in them. Additionally, appellant complains of the introduction of a picture of the appellant, who was clean-shaven at the trial but at the time of his arrest was bearded and with long hair. We think that the case of *Commonwealth* v. *Urbanski*, Ky., 526 S.W.2d 7 (1975) is dispositive of this question.

For the reasons above stated, the judgment of the lower court is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLEE:

Robert F. Stephens
Attorney General

James L. Dickinson
Assistant Attorney General
Captol Building
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLANT:

Brown, Sledd & McCann, PSC
300 West Short Street
Lexington, Kentucky 40507

* * * * * * * *

SUPREME COURT OF KENTUCKY
78-SC-24-D
(CA-1035-MR)

GARRISON FRAZIER — MOVANT

V. MADISON CIRCUIT COURT
No. 76-81

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of Garrison Frazier for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED May 16, 1978.

/s/ John S. Palmore
Chief Justice

* * * * * * *

COMMONWEALTH OF KENTUCKY
(Commonwealth Seal)
COURT OF APPEALS

MANDATE

GARRISON FRAZIER

VS.

COMMONWEALTH OF KENTUCKY

File No. CA-1035-MR
Opinion Rendered SEPTEMBER 9, 1977
REISSUED JANUARY 6, 1978

Appeal From MADISON
Circuit Court Action No. 76-81

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

JANUARY 6, 1978 — Court Order Delivered Denying Appellant's Petition for Rehearing; Withdrew Opinion Opinion of September 9, 1977 and Reissued a Modified Opinion.

MAY 16, 1978 — Movant's Motion for Discretionary Review Denied by Supreme Court.

A Copy - Attest:

(Seal)

Issued MAY 22, 1978

/s/ John C. Scott
JOHN C. SCOTT, CLERK

CA-7

* * * * * * *

SUPREME COURT OF KENTUCKY
No. 78-SC-24-D

GARRISON FRAZIER — MOVANT

V. **ORDER DENYING MOTION FOR RECONSIDERATION**

COMMONWEALTH OF KENTUCKY — RESPONDENT

The motion of Garrison Frazier for a reconsideration of the order denying motion for discretionary review is denied. CR 76.20(9)(c).

Jones, J., would grant motion.

Palmore, C.J., and Reed, Stephenson, Clayton and Sternberg, JJ., sitting.

ENTERED July 21, 1978.

/s/ John S. Palmore
Chief Justice

* * * * * * * *

Supreme Court, U. S.
FILED
SEP 18 1978
ODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-286

GARRISON FRAZIER - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT F. STEPHENS
Attorney General
Capitol Building
Frankfort, Kentucky 40601

JAMES L. DICKINSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

	PAGE
Table of Authorities	ii–iii
Counterstatement of the Questions Presented	1– 2
Opinion Below	2– 3
Constitutional and Statutory Provisions Involved	3
Jurisdiction	3– 6
Reasons for Not Granting the Writ	6–12
Conclusion	13
Proof of Service	14

TABLE OF AUTHORITIES

Cases:

	PAGE
Andresen v. State of Maryland, 427 U. S. 463 (1976)	5
Bell v. State of Maryland, 378 U. S. 226 (1964)	5
Cardinale v. Louisiana, 394 U. S. 437 (1969)	5
Carson v. Commonwealth, Ky., 382 S. W. 2d 85 (1964)	11
Chapman v. California, 386 U. S. 18 (1967)	12
Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 (1970)	8, 9
Denton v. Commonwealth, 188 Ky. 30, 221 S. W. 202 (1920)	9
Ellison v. Commonwealth, 272 Ky. 364, 114 S. W. 2d 130 (1938)	9
Etherton v. Commonwealth, 246 Ky. 553, 55 S. W. 2d 343 (1932)	9
Grigsby v. Commonwealth, 299 Ky. 721, 187 S. W. 2d 259 (1945)	9
Hardin v. Kentucky Utilities Company, 390 U. S. 1 (1968)	12
Harrington v. California, 395 U. S. 250 (1969)	12
Hendron v. Commonwealth, Ky., 487 S. W. 2d 275 (1972)	8, 10, 11
Henry v. State of Mississippi, 379 U. S. 443 (1965)	5
Laine v. Commonwealth, 287 Ky. 134, 151 S. W. 2d 1055 (1941)	9–10
Lair v. Commonwealth, Ky., 330 S. W. 2d 938 (1960)	4
Marcum v. Commonwealth, Ky., 256 S. W. 2d 22 (1953)	4
Michelson v. United States, 335 U. S. 469 (1948)	8, 10, 11
Milam v. Commonwealth, Ky., 275 S. W. 2d 921 (1955)	11
Monks v. New Jersey, 398 U. S. 71 (1970)	5, 8
Rudolph v. United States, 370 U. S. 269 (1962)	12
Sebastian v. Commonwealth, Ky., 436 S. W. 2d 66 (1969)	7

Cases: (Cont'd)

	PAGE
Shackleford v. Commonwealth, 270 Ky. 60, 109 S. W. 2d 13 (1937)	7
Spencer v. Commonwealth, Ky., 467 S. W. 2d 128 (1971)	4, 8
Tacon v. Arizona, 410 U. S. 351 (1973)	5
Taylor v. Commonwealth of Kentucky, ___ U. S. ___, 98 S. Ct. 1930 (1978)	4
United States v. Orgeon, 366 U. S. 643 (1961)	12
Urbanski v. Commonwealth, Ky., 526 S. W. 2d 7 (1975)	11–12

Federal Constitution:

Amendment VI	5, 6
Amendment XIV	5, 6

Federal Statute:

28 U.S.C. 1257(3)	3, 6, 13

Other Authorities:

Supreme Court Rule 19	3, 6, 11, 12, 13
Kentucky Civil Rule 76.32(b)	4
Kentucky Civil Rule 76.20(9)(c)	4
Kentucky Criminal Rule 9.70	5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

GARRISON FRAZIER - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED[1]

(1) Whether the trial court in admonishing the jury deprived the petitioner of his Fourteenth Amendment right to due process of law?

(2) Whether the trial court deprived the petitioner of his Sixth Amendment right to confrontation of

[1]In framing the questions presented, the petitioner chose to present two issues for this Court's consideration. The second question, however, has, in addition to its principal contention, four separate sub-issues. For purposes of clarity, the Commonwealth has elected to treat the sub-issues as separate substantive questions.

witnesses when it ruled that the hearsay statements of co-defendant Hays were admissible as evidence?

(3) Whether the trial court deprived the petitioner of his Fourteenth Amendment right to due process of law when it questioned the petitioner as to the present location of co-defendant Hays?[2]

(4) Whether the trial court deprived the petitioner of his Fourteenth Amendment right to due process of law by permitting the Commonwealth's Attorney to cross-examine the petitioner's character witness as to his present knowledge of petitioner's arrest record?

(5) Whether the admission of a photograph depicting the petitioner's appearance at the time of arrest deprived the petitioner of his Fourteenth Amendment right to due process of law?

(6) Whether the Court of Appeals erred in ruling harmless the errors, if any, of the trial court?

OPINION BELOW

The Opinion below from the Court of Appeals of Kentucky *as modified* is styled Garrison Frazier v. Commonwealth of Kentucky and is unpublished. The Supreme Court of Kentucky on May 16, 1978, declined to exercise its judicial discretion to review the Opinion of the Court of Appeals of Kentucky. On July 21, 1978, the Supreme Court of Kentucky refused to reconsider its order denying petitioner's motion for discretionary review. The Opinion of the Court of Appeals of Kentucky, the Opinion of the Court of Appeals of Kentucky as modified, the Order of the Supreme Court of Kentucky denying petitioner's motion for discretionary review, the Mandate of the Court of Appeals of Kentucky, and the Order of the Supreme Court of Kentucky denying the petitioner's motion for reconsideration are all correctly set forth in the appendix of the petitioner's petition for writ of certiorari, commencing with page 1a of the brief.

[2]Although Hays was jointly indicted with the petitioner, he failed to appear for trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly set forth in his brief all of the constitutional and statutory provisions needed to resolve the issues presented.

JURISDICTION

Petitioner's application for a writ of certiorari to the Court of Appeals of Kentucky does not comply with the prerequisites of either 28 U.S.C. 1257(3) or Rule 19 of this Court. Accordingly, the petition should be dismissed. A brief review of the issues presented to the trial court will demonstrate the validity of the Commonwealth's position.

Petitioner's primary argument is grounded upon a contention that the trial court gravely prejudiced the rights of the petitioner when in the course of its admonishment it remarked that the jurors were probably forming an opinion as to the petitioner's innocence

or guilt. The petitioner did not object to the remark at trial and this issue was not presented on appeal to the Court of Appeals of Kentucky.[3] The issue as to whether the admonishment constituted reversible error was not presented in the petitioner's petition for rehearing.[4] On motion for discretionary review this issue was finally raised. After the motion was summarily denied by the Supreme Court of Kentucky, the petitioner represented the issue in a motion for reconsideration and relied on *Taylor* v. *Commonwealth of Kentucky,* —— U. S. ——, 98 S. Ct. 1930 (1978). Again, the Supreme Court of Kentucky denied the petitioner any further relief.

In examining the procedural history of this matter, it is evident that under the rules of procedure of Kentucky this issue has not been properly preserved for appellate review. *Cf. Spencer* v. *Commonwealth,* Ky., 467 S. W. 2d 128 (1971); *Marcum* v. *Commonwealth,* Ky., 256 S. W. 2d 22 (1953). Since the issue was not presented in the initial appeal, the question, despite the original waiver, cannot be reviewed in a petition for rehearing or other subsequent proceedings. See Kentucky Civil Rule 76.32(b), 76.20(8)(c);[5] *Lair* v. *Commonwealth,* Ky., 330 S. W. 2d 938 (1960). Consequently, this alleged federal question was never

[3]This issue, however, was raised during oral argument. The appellate court did not discuss the merits of the contention in its Opinion.

[4]The Opinion was modified due to slight misstatement of fact in the original Opinion.

[5]The petitioner acknowledged this procedural barrier in footnote one (1) of his petition for writ of certiorari. See petitioner's brief, pp. 4-5.

before the courts of Kentucky and, therefore, it is quite obviously not subject to review by this Court. *Monks* v. *New Jersey,* 394 U. S. 1 (1970). See also *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *Tacon* v. *Arizona,* 410 U. S. 351 (1973).[6]

Turning now to the petitioner's second question consisting of four separate issues, it is the contention of the Commonwealth that none of these issues were presented in the initial briefs on appeal as substantive federal questions. All of the questions below were resolved on the basis of state grounds. Thus, the petitioner is presenting for the first time an allegation that these alleged errors violated the rights of the petitioner as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States. Under the decisions of this Court, these errors are not subject to consideration. This Court has consistently held that the existence of an independent state ground would preclude review of a related federal question. *Henry* v. *State of Mississippi,* 379 U. S. 443 (1965). In this case, it is obvious that the Opinion of the Court of Appeals of Kentucky was entirely based on considerations of state procedural rules and applicable Kentucky decisions. Unless there exists an extraordinary constitutional situation, state interpretations of state statutes are binding on this Court. *Bell* v. *State of Maryland,* 378 U. S. 226 (1964).

[6]The petitioner's argument is also subject to attack on the grounds that the nature of the controversy presents a separate, independent state question. The matter involves a construction of RCr 9.70, a rule of criminal procedure. Under the rules of this Court, the existence of a separate state ground ordinarily precludes review. *Andresen* v. *State of Maryland,* 427 U. S. 463, 478 fn. 9 (1976).

In conclusion, the petitioner's efforts to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3) is without appreciable merit.

REASONS FOR NOT GRANTING THE WRIT

The question of whether the petitioner has properly fulfilled the requirements of 28 U.S.C. 1257(3) notwithstanding, it is evident that petitioner has failed to present sufficient grounds under Rule 19 to justify the invocation of this Court's discretionary power to review.

As previously noted, the petitioner's second argument raises a number of distinct issues. Although they are resolvable under state authority, it is apparent that under federal law the trial court's ruling did not violate either the Fourteenth or Sixth Amendment rights of the petitioner. A brief survey of the petitioner's issues will demonstrate their inherent lack of merit. For purposes of this survey, the respondent accepts as substantially correct the statement of the case as presented in petitioner's brief, pp. 3-8.

Initially, the petitioner complains that the trial court erroneously permitted the introduction of certain hearsay statements that were made by co-defendant Hays. An examination of the facts as presented by the petitioner reveals that Hays made two statements about the gun. The first statement was an absolute denial of any knowledge. The second statement was in the nature of an exculpatory explanation. According to Hays, they had found the gun and, because they had gotten scared, he placed it under the car. Absolutely nothing was said by Hays that could possibly incriminate the petitioner. The petitioner maintains, however, that since the credibility of the story was weak, it necessarily damaged his credibility. Assuming that this argument has merit, it must be noted that the real damage to the petitioner's case occurred when the officer testified that he saw the gun being placed under the car. The unexplained possession of the gun plus the evidence of the forcible entry was enough to prove up a prima facie case. The prejudice, if any, that occurred therefore was slight.

The respondent must frankly confess that it finds the petitioner's contention somewhat confusing. This confusion stems from the fact that the objectionable statement is exculpatory in nature, and not incriminating. If the situation were reversed, with the petitioner attempting to gain admission for the statement, the trial court under Kentucky law would undoubtedly rule against him on the grounds that the statements were inadmissible for being self-serving. See *Sebastian* v. *Commonwealth,* Ky., 436 S. W. 2d 66 (1969), and *Shackleford* v. *Commonwealth,* 270 Ky. 60, 109 S. W. 2d 13 (1937). This Court should note that the Court of Appeals of Kentucky concluded that this issue was without merit for the self-evident reason that Hays' statements were exculpatory. See petitioner's appendix, p. 2a.

The petitioner also alleges that the trial court exhibited a prejudicial bias toward him when it asked the petitioner about the current location of Hays. No objection was entered by the petitioner. For reasons

previously set forth as to the effect of noncompliance with the procedural rules of Kentucky, it is not necessary or expedient to address the merits of this issue. *Spencer* v. *Commonweath, supra; Monks* v. *New Jersey, supra.*

A more significant issue is the contention that the Commonwealth improperly cross-examined a character witness as to the extent of his familiarity with the petitioner's background. As will be seen, both *Hendron* v. *Commonwealth,* Ky., 487 S. W. 2d 275 (1972), and this Court's decision of *Michelson* v. *United States,* 335 U. S. 469 (1948), dispose of the petitioner's allegation of error.

Petitioner propounds as part of his argument the contention that a so-called "Cotton"[7] violation occurred when the Commonwealth's Attorney inquired of a defense witness, who was testifying as to the petitioner's reputation for honest and fair dealing, whether the witness was aware that the petitioner had been arrested for theft by unlawful taking. The witness replied in the negative. An objection was entered by the petitioner but an admonition was not requested. Petitioner now contends that this question constituted prejudicial error on the theory that the "Cotton" rule as set forth in *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970), specifically states that a witness' credibility can only be impeached by way of convictions of

[7]Referring to *Cotton* v. *Commonwealth,* Ky., 454 S. W. 2d 698 (1970), forbidding the impeachment of the defendant or other witness with prior felony convictions unless it could be affirmatively shown in a hearing that the prior felony conviction has a bearing on the truth or veracity of the testifying witness.

crimes involving dishonesty or stealing. Since the petitioner was never convicted of this crime, the petitioner argues that the use of this arrest charge was improper and prejudicial. In response, the Commonwealth points out that the requirements of *Cotton* v. *Commonwealth, supra,* are not applicable to the facts of this case.

The "Cotton" prohibition is not at issue for the simple reason that it was the petitioner's character, not his credibility, that was at stake. It is settled in Kentucky that once the defendant has introduced good character as an issue, the prosecution may rebut it, *Grigsby* v. *Commonwealth,* 299 Ky. 721, 187 S. W. 2d 259 (1945); *Denton* v. *Commonwealth,* 188 Ky. 30, 221 S. W. 2d 202 (1920). Rebuttal can take two forms. The first device is to call witnesses who will testify as to the bad reputation of the witness, *Denton, supra.* The other device involves impeaching the credibility of the character witness.

Generally, the credibility of the witness can be impeached by demonstrating that the witness was not familiar with the defendant's reputation, *Etherton* v. *Commonwealth,* 246 Ky. 553, 55 S. W. 2d 343 (1932), and *Ellison* v. *Commonwealth,* 272 Ky. 364, 114 S. W. 2d 130 (1938). Although reputation cannot be proved by knowledge of specific acts of conduct, the credibility of a witness can be destroyed by showing ignorance of specific facts. Questions regarding previous arrests or convictions are permitted, *Laine* v. *Commonwealth,* 287 Ky. 134, 151 S. W. 2d 1055 (1941). In *Laine,* the

Supreme Court of Kentucky considered the precise contention that the petitioner has raised and concluded:

> "It is competent for the Commonwealth on cross-examination of character witnesses to ask them if they have heard of such charges being made against the defendant, but it is only competent for the purpose of testing the recollection or information of the witnesses relative to defendant's general reputation; and where there is an objection to such testimony, or a motion to limit its effect, the court should admonish the jury that it is admitted for the sole purpose of testing the accuracy or credibility of the witness and not as substantive evidence of defendant's guilt." *Laine, supra* at 1057.

Accord, Hendron v. *Commonwealth, supra.*

This proposition is directly supported by this Court's decision of *Michelson* v. *United States, supra.* In *Michelson,* the appellant argued that the inquiry of a defense witness as to whether he had heard that the appellant had been previously arrested for possessing stolen goods was prejudicial error. The Court concluded that it was not, and in so concluding said:

> "It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abidding citizen. The cross-examination may take in as much ground as the testimony it is designed to verify. To hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding in reputation when such might not be the fact; the refutation was founded on convictions equally persuasive though not for crimes exactly repeated in the present charge." *Michelson, supra* at 484.[8]

In light of *Michelson* and *Hendron,* it is clear that the tactics employed by the Commonwealth's Attorney did not violate any of the petitioner's rights to a fair trial. The soundness of the legal theory relating to the proper impeachment of the credibility of a character witness precludes under Rule 19 further consideration of the issue by this Court.

Finally, the petitioner bitterly complains about the admissibility of a photograph displaying his appearance at the time of his arrest. It should be stressed that the picture was not a mug shot and there was a total lack of any indication that the petitioner had previously been involved in criminal activities.

The introduction of the photograph did not prejudice the jury. Reference is made to the long hair of the petitioner in the photgraph, but no reference to the physical characteristics of the petitioner was ever made by the Commonwealth's Attorney. The photograph was innocent in appearance and could not possibly influence the minds of the jurors. Although the photograph was not helpful, it certainly was not harmful, *Milam* v. *Commonwealth,* Ky., 275 S. W. 2d 921 (1955), *cert. den.* 349 U. S. 964, 75 S. Ct. 897, 99 L. Ed. 1286 (1955); *Carson* v. *Commonwealth,* Ky., 382 S. W. 2d 85 (1964); and *Urbanski* v. *Commonwealth,* Ky., 526

---

[8]The Court of Appeals of Kentucky specifically relied on *Michelson* when it concluded that the petitioner's allegations were without merit. See petitioner's appendix, pp. 2a-3a.

S. W. 2d 7 (1975). The petitioner's last contention is devoid of merit and does not present a significant constitutional question.

Before concluding, it is interesting to note that the petitioner develops his arguments in the guise of whether the trial court erred in failing to state that the errors, if any, were harmless beyond a reasonable doubt. The assertion is meritless. Petitioner's reliance on *Harrington* v. *California,* 395 U. S. 250 (1969), and *Chapman* v. *California,* 386 U. S. 18 (1967), is obviously misplaced.

Respondent has briefly reviewed the petitioner's grounds supporting his application for certiorari in order to show that none of the issues presented for review merit serious consideration. As stated in Rule 19 of the Supreme Court Rules, the granting of a review on a petition for writ of certiorari is purely within the discretion of the Court. Ordinarily a writ will be granted only where there are special and important reasons therefor. See *Hardin* v. *Kentucky Utilities Company,* 390 U. S. 1 (1968); *United States* v. *Oregon,* 366 U. S. 643 (1961); and *Rudolph* v. *United States,* 370 U. S. 269 (1962).

In view of the requirements of Rule 19, it is clear that the petitioner has failed to demonstrate a compelling need for a review of the Opinion of the Court of Appeals of Kentucky.

CONCLUSION

In the course of its jurisdictional argument, the respondent has endeavored to point out the deficiencies of the petitioner's request for a writ of certiorari under 28 U.S.C. 1257(3) and Rule 19. To this end, the respondent has discussed briefly the nature of the issues involved and, further, has demonstrated that the petitioner has failed to satisfy either the requirements of §1257(3) or the standards as set forth in Rule 19. Since the petitioner has apparently failed to overcome the initial jurisdictional and discretionary barriers preventing review, further treatment and discussion of the merits is not warranted.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
By: JAMES L. DICKINSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1978, I served the petitioner with Brief for Respondent in Opposition to Petition for a Writ of Certiorari by placing three (3) copies of the same in the United States mail, first-class postage prepaid, and addressed to Honorable John Y. Brown, Sr., Brown, Sledd & McCann, PSC, 300 West Short Street, Lexington, Kentucky 40507, Counsel for Petitioner, and served the Commonwealth's Attorney by placing one (1) copy of same in the United States mail, first-class postage prepaid, and addressed to Honorable Reuben G. Walker, Assistant Commonwealth's Attorney, 214 North Second Street, Richmond, Kentucky 40475.

George M. Geoghegan, Jr.

GEORGE M. GEOGHEGAN, JR.
Assistant Attorney General